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# LITIGATING INDIGENOUS PEOPLES' RIGHTS IN AFRICA: POTENTIALS, CHALLENGES AND LIMITATIONS

JÉRÉMIE GILBERT\*

**Abstract** Adopting a comparative analysis, this article examines some recent litigation which has focused on indigenous peoples' rights across the African continent. The aim is to explore both the potential and the challenges and limitations of litigation as a tool for supporting the rights of indigenous peoples. The article explores the extent to which a specific African jurisprudence is emerging on issues that are essential to indigenous peoples such as non-discrimination, self-identification, land rights and development. It also focuses on the practical issues that arise when engaging with litigation in order to explore the extent to which litigation can contribute to the legal empowerment of some of the most marginalized indigenous communities in Africa.

**Keywords:** Africa, development, indigenous peoples, land rights, legal empowerment, litigation.

## I. INTRODUCTION

It is estimated that approximately 50 million indigenous peoples live across the African continent.<sup>1</sup> Commonly across the continent, they face hardship, discrimination, non-recognition of their rights to lands and natural resources, as well as high levels of economic, social and cultural marginalization.<sup>2</sup> In many parts of Africa, indigenous communities are forced out of their ancestral lands to make room for the establishment of wildlife reserves, tourism resorts, or to allow the extraction of natural resources. All these issues have been examined and analysed in a groundbreaking report issued in 2003 by the Working Group on Indigenous Populations/Communities of the

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<sup>1</sup> See International Work Group on Indigenous Affairs, at <<http://www.iwgia.org/regions/africa>>.

<sup>2</sup> On the situation of indigenous peoples in Africa, see R Laher and K Singi Oei (eds), *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (Africa Institute of South Africa 2014); S Dersso (ed), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (PULP 2010).

African Commission on Human and Peoples' Rights which provides an in-depth analysis of the situation of indigenous peoples in Africa.<sup>3</sup> As noted in this report, the rights of indigenous peoples are often a very controversial and complex issue across the continent. The definition and scope of indigenous peoples' rights are usually contentious in most African countries. At the national level, many States are still reluctant to recognize the specific rights of indigenous peoples.<sup>4</sup> The term 'indigenous peoples' itself is usually seen as contentious issue.<sup>5</sup> The term is often perceived as a 'Western invention', which might be relevant in countries which have witnessed a large influx of white settlers, such as Australia, the United States or Canada, but not for Africa. Several States have argued that the reference to being 'first and original occupants' of a territory, which is implied by the term indigenous, is not relevant to Africa.<sup>6</sup> This debate on the definition of who are the indigenous peoples of Africa, and whether this legal category is relevant to the continent, has undermined progress on the protection of the rights of indigenous peoples in Africa.<sup>7</sup>

There are nonetheless significant signs of the emergence of new legal frameworks to recognize and protect indigenous peoples' rights across the continent. The new constitution of Kenya, adopted in 2010, recognizes 'historically marginalized groups', including indigenous communities. The constitution of Cameroon also mentions indigenous peoples, and in Burundi the constitution provides for special representation of the indigenous Batwa people in the National Assembly and the Senate. In 2010, the Central African Republic became the first African country to ratify the ILO Convention No. 169; and in 2011, the Republic of Congo became the first African country to adopt a specific law on the promotion and protection of the rights of indigenous populations. Nonetheless, despite these significant changes in the legal landscape relating to indigenous peoples' rights, most indigenous peoples still do not have access to legal remedies, and most national legal systems do not specifically recognize and protect their rights. With this lack of specific legal protection, one solution is often to turn to courts to seek legal remedies. There have been considerable efforts by many communities across the continent to develop their legal and advocacy capacity to seek legal

<sup>3</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities submitted in accordance with 'Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005).

<sup>4</sup> See F Thornberry and F Viljoen, *Overview Report on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries* (International Labour Organization and African Commission on Human and Peoples' Rights 2009).

<sup>5</sup> W van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104(1) AJIL 29.

<sup>6</sup> See J Ngugi, 'The Decolonisation-modernisation Interface and the Plight of Indigenous Peoples in Post-colonial Development Discourse in Africa' (2002) 20 WisIntLJ 289.

<sup>7</sup> See F Mukwiza Ndahinda, *Indigeness in Africa: A Contested Legal Framework for Empowerment of 'Marginalized' Communities* (Springer 2011).

remedies.<sup>8</sup> In the last few years, many communities have engaged with litigation as a potential way to achieve recognition of their rights and challenge the discrimination they face. There have been some important decisions at the regional level, notably with the adoption of a decision against Kenya in 2010 by the African Commission on Human and Peoples' Rights Commission concerning the indigenous Endorois community.<sup>9</sup> This decision has been hailed as a 'landmark' as it touches on several crucial issues regarding the development of indigenous peoples' rights in Africa.<sup>10</sup> The African Court on Human and Peoples' Rights is also examining cases concerning an indigenous community.<sup>11</sup> In parallel to the emergence of a regional jurisprudence, there is an increased use of national courts as a place in which indigenous peoples' can seek recognition and remedies. In the last decade there have been some significant cases at the national level, including rulings from the High Court of Botswana,<sup>12</sup> the Constitutional Court of South Africa,<sup>13</sup> and the High Court of Uganda<sup>14</sup> among others. There are also important cases currently being examined by the Constitutional Court of Uganda and the High Court of Namibia.<sup>15</sup>

This article examines some of these cases in order to assess their impact on the protection and development of indigenous peoples' rights. The aim is to explore both the potential and the challenges and limitations of litigation as a tool for supporting the rights of indigenous peoples in Africa. For that purpose, this article focuses on cases that have been presented as being within the legal field of indigenous peoples' rights, either by the applicants, the judges, the lawyers or civil society advocates involved in the cases. Apart from the content of the cases and the jurisprudence they create, it is important to analyse these cases in terms of the larger legal, political, economic and social impact they may or may not have in promoting and protecting the rights of

<sup>8</sup> See G Wachira Mukundi and T Karjala, 'Advocacy for indigenous peoples' rights in Africa' in *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (n 2) 104.

<sup>9</sup> African Commission on Human and Peoples' Rights, Comm No 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010).

<sup>10</sup> See J Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) ICLQ 245.

<sup>11</sup> In March 2013 the Court issued an order of provisional measures in respect of the situation of the Ogiek of the Mau Forest in Kenya, prohibiting land transactions in the Mau Forest Reserve protected area and other actions likely to prejudice the Ogiek's claim. The case was heard in November 2014 and the case remains pending, with judgment scheduled for 2017.

<sup>12</sup> *Roy Sesana (First Applicant), Keiwa Setlhobogwa and 241 others, (Second and Further Applicants) v the Attorney General of the Republic of Botswana*, High Court of Botswana (2006); and *Matsipane Mosetlhanyene (First Appellant) and Gakenyatsiwe Matsipane (Second Appellant) v the Attorney General (Respondent)*, High Court of Botswana (27 January 2011).

<sup>13</sup> *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

<sup>14</sup> Consent Judgment and Decree, *Uganda Land Alliance, Ltd. v Uganda Wildlife Auth.*, Misc Cause No 0001 of 2004 (High Court of Uganda at Mbale).

<sup>15</sup> The case concerns the forced eviction of the San from the Etosha National Park. A demand for a class action is presently examined by the court, see <<http://www.osisa.org/indigenous-peoples/namibia/haiom-set-make-legal-history-etosha-aboriginal-land-claim>>.

indigenous peoples. Increasingly, questions have been raised about the 'value' of litigation, and more specifically about strategic litigation, as an efficient tool to challenge embedded forms of discrimination faced by indigenous peoples.<sup>16</sup> This is an issue which relates not only to the lack of implementation of the courts' decisions, but also the cost and time involved in litigation, as well as the limitations of legal language to address the very complex socio-economical issues faced by indigenous peoples. Overall, the aim of this article is to explore the potentials of litigation as a tool for advocacy across the continent.

To undertake this task, the article is divided into four different thematic sections. The first section examines how courts have engaged with the legal concept of indigenous peoples, focusing on definition and discrimination. The second section explores how courts have dealt with the crucial issue of land rights, which is seen as an essential element of indigenous peoples' rights.<sup>17</sup> The third section focuses on the issue of development, conservation and tourism, three 'ingredients' that often result in the forced displacement of indigenous peoples. It examines how courts have dealt with the argument put forward by State authorities that the forced displacement of indigenous communities is necessary to support development, enhance conservation or promote tourism. The final section focuses on legal strategies with the aim of critically examining the value of litigation as a tool of empowerment for marginalized indigenous communities.

## II. 'INDIGENOUSNESS', 'AUTHENTICITY' AND DISCRIMINATION

Most, if not all, indigenous communities face discrimination and marginalization. In most cases the first step in litigation is for communities to claim their rights as indigenous peoples, to be recognized as citizens of the State with equal rights, but also with special entitlements against discrimination in order to fight the embedded forms of racism they usually face. At the heart of this claim is the call to recognize that, as a specific category of rights holders, indigenous peoples are entitled to be recognized as beneficiaries of specific non-discriminatory policies.<sup>18</sup> Most governments across the continent have resisted the development of specific legislation, or policies, which put in place special measures to address the entrenched discrimination faced by indigenous peoples. Many governments have put forward the argument that all inhabitants are indigenous to the continent, and that therefore the concept of 'indigenous

<sup>16</sup> See J Gilbert, *Strategic Litigation Impacts on Indigenous Peoples' Land Rights* (Open Society, Justice Initiative, 2017).

<sup>17</sup> A Barume, *Indigenous Peoples Land Rights in Africa* (2nd rev edn, International Work Group for Indigenous Affairs 2015).

<sup>18</sup> See B Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 NYUJIntL&Pol 189; P Thornberry, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5(2) HRLRev 239.

peoples' as developed under international law is irrelevant.<sup>19</sup> Governmental policies and directives often rely on a colonial approach to the notion of 'indigenous' or 'native' peoples under which all Africans (as opposed to settlers and colonizers) were labelled as 'indigenous' or 'natives'. The notion of indigenous peoples has greatly evolved over the last few decades, acquiring a contemporary interpretation, which modifies the colonial approach which defined all the inhabitants of the continent as 'indigenous' and 'natives'. Hence an important element in the litigation process is often to get the court to apply and recognize this contemporary approach to indigenous peoples' rights.

#### A. 'Authenticity' and 'Indigenous' Rights in Botswana

Over the last decade Botswana has been at the centre of litigation on indigenous peoples' rights, which has attracted significant attention nationally, regionally and internationally.<sup>20</sup> At the heart of the legal battle was the claim of the San and Bakgalagadi residents of the Central Kalahari Game Reserve (CKGR)—Botswana's largest protected area and the second largest game reserve in Africa—that they had been illegally removed from their ancestral land by the government. There have been issues about the rights of the indigenous community in the CKGR for many years, as the reserve was established in 1961, but matters accelerated in 1997 when some of the people in the reserve were relocated, and the situation worsened in 2002 when the government informed the remaining residents of the CKGR that they were shutting down the wells and stopping all food deliveries inside the reserve.<sup>21</sup> The government then proceeded with the removal of the peoples and their possessions out of the reserve. The residents decided to challenge their removal in court.<sup>22</sup>

Whilst the litigation was mainly about determining the rights to land and services for the indigenous communities, the issue of determining the specific rights of the CKGR inhabitants as an indigenous community was equally

<sup>19</sup> See AK Barume, 'Responding to the Concerns of the African States' in C Charters, and R Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009).

<sup>20</sup> Central Kalahari Legal Case No MISCA 52/2002 in the *Matter between Roy Sesana, First Applicant, Keiwa Setlhobogwa and 241 others, Second and Further Applicants, and the Attorney General* High Court of Botswana (2006); High Court Civil Case No MAHLB 000 393–09 *In the matter between Matsipane Mosetlhanyene, First Appellant, and Gakenyatsiwe Matsipane, Second Appellant, and the Attorney General Respondent* (2011).

<sup>21</sup> See M Sapignoli and R Hitchcock, 'A Chronology of the Central Kalahari Game Reserve: Update III, 2002–2012' (2013) 45 Botswana Notes and Records 52; and R Hitchcock, M Sapignoli, and W Babchuk, 'What about Our Rights? Settlements, Subsistence, and Livelihood Security among Central Kalahari San and Bakgalagadi' (2011) 15(1) *IJHR* 67.

<sup>22</sup> Their case was first dismissed but went on appeal in to the High Court, see High Court of Botswana, *Roy Sesana, Kiwa Setlhobogwa, & 241 Others v the Attorney General of Botswana*, Case No 52 of 2002.

fundamental. The government of Botswana is well known for its opposition to the notion of indigenous peoples' rights.<sup>23</sup> A constant argument of the government's lawyers in the court case was that the San residents of the CKGR were not entitled to any specific rights, but should be treated as any other citizens of the State. Based on this approach, the argument put forward was that the San residents of the CKGR should be removed from their land to ensure their access to 'modernization' and 'progress', like other citizens of the country. One of the justifications for their forced relocation was to bring their standards of living up to the level of the rest of the country. As the minister for local government put it: 'We as governments simply believe that it is totally unfair to leave a portion of our citizen undeveloped under the pretext that we are allowing them to practice their culture.'<sup>24</sup> During the trial, the government's lawyers put forward the fact that the applicants' were 'no longer authentic' because they were not hunting and gathering full-time, as they had in the past, and were involved in agriculture, livestock production, and migrant labour. On the other side of the spectrum, the legal counsel for the applicants referred to the concept of indigenous peoples' rights as developed under international law, highlighting the need for the court to recognize their entitlements as specific indigenous rights. The recognition of the CKGR residents as indigenous peoples was an important element of their legal claims. Most important was the recognition of the CKGR inhabitants as the 'Bushmen' mentioned in Article 14.3.c of the Constitution, as people having certain rights to reside in the Reserve. As noted by Sapignoli, the San and Bakgalagadi 'in speaking about indigeneity, entering the Court and adopting its language, found a way to obtain their rights'.<sup>25</sup> As she noted: '(...) indigeneity in Africa is a recent identity claim born in the 1990s with the emergence of the international indigenous movement and international law and organizations on indigenous peoples. The Botswana Court Case and Bushmen's self-identification as indigenous peoples cannot be understood without considering these local, national, and global relationships.'<sup>26</sup> During the court hearings much emphasis was put on the need for anthropological experts to 'prove' the originality and 'authenticity' of the indigenous claims.

Ultimately, the High Court recognized the right of the community to live on their ancestral territory. In reaching this decision, two of the judges specifically highlighted the need to recognize them as indigenous, with Justice Dow noting: 'the fact the applicants belong to a class of peoples that have now come to be

<sup>23</sup> Botswana was one of the governments which derailed the process for the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2006.

<sup>24</sup> CCJ 2006, Bundle 1A 104 (Exp32)—Letter from Minister Margaret Nasha to Ditshwanelo, dated 7 January 2002—as quoted in M Sapignoli, 'Dispossession in the Age of Humanity: Human Rights, Citizenship, and Indigeneity in the Central Kalahari' (2015) 25(3) *Anthropological Forum* 285.

<sup>25</sup> M Sapignoli, 'Indigeneity and the Expert: Negotiating Identity in the Case of the Central Kalahari Game Reserve' (2009) 12 *Law and Anthropology: Current Legal Issues* 247.

<sup>26</sup> *ibid* 267.

recognized as "indigenous peoples" is of relevance'.<sup>27</sup> As highlighted by the judge, this meant that the relevant international legal principles regarding indigenous peoples' rights, and notably the Convention of the Elimination of All Forms of Racial Discrimination (ICERD), were relevant to the case.<sup>28</sup> More generally, all the judges accepted that being recognized as 'indigenous peoples' meant that the colonial acquisition of their land and the following post-independence land legislation had not extinguished their rights to use their ancestral territories. Knowing that the government was pressing for the rejection of this legal approach, which recognized the relevance of indigenous peoples' rights in the country, this was certainly an important legal development. As analysed by Hitchcock, Sapignoli and Babchuk: 'The San of Botswana, in defining themselves as "indigenous" before and during the Central Kalahari court case, did so purposely. They sought to re-assert their rights, using the concept of indigeneity as a means of defining themselves as a group that: (1) was different from the majority population; (2) that historically had been mistreated and discriminated against; and (3) that this treatment occurred in part because of their lifestyles and distinct cultural attributes.'<sup>29</sup>

### B. The 'Invisible' Batwa of Uganda

In 2013, several members of Batwa communities of Southwest Uganda submitted a petition to the Constitutional Court.<sup>30</sup> The petition seeks recognition of their status as indigenous peoples, redress for the historic marginalization and discrimination they are facing, and compensation for the continuous human rights violations they have experienced as a result of being dispossessed of their ancestral lands. The Batwa have been gradually evicted from their lands following the creation of national parks in the forests covering their ancestral territories.<sup>31</sup> The establishment of these national parks started during the colonial time in the 1930s, but many Batwa continued to live in the forest and to use its resources until the 1990s when they were evicted, without consultation, adequate compensation or any offer of alternative land. As a result, the Batwa have been living at the borders of

<sup>27</sup> CCJ 2006, at 201.

<sup>28</sup> On the role of ICERD and indigenous peoples, see P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 199.

<sup>29</sup> Hitchcock, Sapignoli and Babchuk (n 21) 63.

<sup>30</sup> For detailed information about the Batwa, see J Lewis, *The Batwa Pygmies of the Great Lakes Region* (MRG 2000); J Woodburn, 'Indigenous Discrimination: The Ideological Basis for Local Discrimination against Hunter-Gatherer Minorities in Sub-Saharan Africa' (1997) 20(2) *Ethical and Racial Studies* 345; D Jackson, *Twa Women Twa Rights in the Great Lakes Region of Africa* (Minority Rights Group International 2003); J Nelson and L Hossack (eds), *From Principles to Practice: Indigenous Peoples and Protected Areas in Africa* (Forest Peoples Programme 2003).

<sup>31</sup> The Batwa's ancestral territory covers several areas of the Bwindi Impenetrable National Park, Mgahinga Gorilla National Park and Echuya Central Forest Reserve.



the parks as squatters on other peoples' land, resulting in severe poverty, malnutrition and health problems.<sup>32</sup> This loss of their lands and sources of livelihood is accentuated by the high levels of discrimination they are facing in Ugandan society.<sup>33</sup> In general, the Batwa suffer from extreme and embedded forms of discrimination from mainstream society.<sup>34</sup> They particularly suffer from forced labour, lack of political representation and participation, lack of access to education, housing, healthcare, social security and benefits.<sup>35</sup>

One of the arguments put forward by the Batwa in their petition to the Constitutional Court relates to their recognition as indigenous peoples. The government has so far rejected their claims as indigenous peoples, not recognizing their specific rights to land and natural resources, and not acknowledging the need to develop special measures to address the discrimination they are facing. In its Third Schedule, the 1995 Constitution lists 'indigenous communities'. However, this Schedule is based on its colonial roots, listing all the 'Tribes' existing or residing within the colonial borders of Uganda as of 1926. Hence the Constitution adopts a very colonial tone by labelling all ethnic groups of the country as indigenous peoples, but not putting in place special measures of protection for the most marginalized indigenous communities. In the petition and in the expert affidavits submitted to the Constitutional Court, the importance of using contemporary standards of definition used at international and regional levels has been put forward as an essential element of their claim. The petitioners have invited the Court to consider the definition proposed by the Working Group on Indigenous Population/Communities of the African Commission (WGIP) which defines indigenous peoples based on the characteristics that:

- a) their culture and way of life differ considerably from the dominant society, to the extent that their culture is under threat of extinction;
- b) the survival of their particular way of life depends on access to lands and natural resources;

<sup>32</sup> L Berrang-Ford *et al.*, 'Vulnerability of Indigenous Health to Climate Change: A Case Study of Uganda's Batwa Pygmies' (2012) 75(6) *Social Science & Medicine* 1067; S Harper, 'Social Determinants of Health for Uganda's Batwa' (June 2012) *Africa Portal* 32.

<sup>33</sup> See C Kidd, 'Inventing the "Pygmy": Representing the "Other", Presenting the "Self" (2009) 20(4) *History and Anthropology* 395.'

<sup>34</sup> See C Kidd, 'Development Discourse and the Batwa of South West Uganda: Representing the "Other": Presenting the "Self" (unpublished PhD thesis, Glasgow 2008) available at <<http://theses.gla.ac.uk/169/>> C Kidd and P Zaninka, 'Securing Indigenous Peoples' Rights in Conservation: A Review of South-West Uganda' (Forest Peoples Programme and United Organisation for Batwa Development in Uganda 2008).

<sup>35</sup> See K Kabanukye and D Kwagala, *Culture, Minorities and Linguistic Rights in Uganda: The Case of The Batwa and The Ik* (KHURIPPEC Working Paper No 11); N Mukasa, 'The Batwa Indigenous People in Uganda and their Detachment from Forest Livelihood: Land Eviction and Social Plight' (2012) *Yearbook on Humanitarian Action and Human Right* 71; The Parliament of the Republic of Uganda, The Equal Opportunities Committee's Working Visit to Bundibugyo and Kisoro Report (Government of Uganda 2007).

- c) they suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society;
- d) they often live in inaccessible regions and are often geographically isolated;
- e) they are subject to domination and exploitation within national political and economic structures.<sup>36</sup>

The petitioners have also highlighted that the African Commission has further clarified that the term indigenous populations does not mean 'first inhabitants' in reference to aboriginality in postcolonial settlers societies. As noted by the African Commission: 'if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analyzing the internal structural relationships of inequality that have persisted from colonial dominance'.<sup>37</sup>

Relying on this approach, the petitioners want to challenge the historical (and colonial) classification of all tribes of the country as indigenous, and get the court to recognize formally their legal status as indigenous peoples. Hence, an important aspect of the petition is the demand that the Constitutional Court recognizes their self-identification as indigenous peoples as defined under international law. Such recognition would entitle them to have access to specific affirmative action policies. Article 32 of the Constitution affirms that the government 'shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them'. Despite the widespread discrimination faced by the Batwa, the government has not developed any affirmative action policies to tackle such entrenched forms of discrimination. In claiming their rights to be recognized as indigenous peoples who are facing historically embedded forms of discrimination, they are inviting the Constitutional Court to declare the government in breach of its constitutional obligation.

This case, and the previous case concerning Botswana, show the importance for the concerned communities of being able to articulate their rights under the banner of indigenous peoples' rights. In these two cases (as well as in the cases that will be examined below), the lack of a proper legal framework coupled with the lack of political will to protect their rights as indigenous peoples has pushed

<sup>36</sup> Report of the African Commission Working Group of Experts on Indigenous Population/Communities submitted in accordance with the 'Resolution on the rights of indigenous peoples/communities in Africa' and adopted by the African Commission at its 28th ordinary session in November 2003 and published in 2005.

<sup>37</sup> African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group of Experts on Indigenous Populations Communities, submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa', adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005) 92-3.

the concerned communities to take legal action against the government. The recognition by the national courts that they are indigenous peoples constitutes an important first step in recognizing them as historically discriminated-against societies entitled to specific rights, notably rights to lands and natural resources as examined below.

### III. IN THE SHADOW OF COLONIZATION: THE SURVIVAL OF CUSTOMARY LAND RIGHTS

Undeniably, the colonial history of the continent plays a significant role regarding indigenous peoples' rights, and especially regarding their right to land. Colonial rules had a considerable negative impact on land rights for most indigenous peoples. When their land rights were not ignored they were seriously curtailed and ultimately submitted to the overall control of colonial administrations, notably under the system of trusteeship.<sup>38</sup> This overall rejection of land rights for indigenous peoples was based on the discriminatory and racist theories of non-usage of the land and lack of 'proper' formal land tenure systems.<sup>39</sup> In postcolonial Africa many of the independent States have not fundamentally rejected this approach and have maintained a *status quo ante* which often results in the forced expulsion of indigenous peoples from their ancestral lands. Hence an important question regarding the value of litigation is the capacity of the courts to reverse centuries of discriminatory practices that have rejected indigenous peoples' land tenure systems as archaic and inexistent.

A critical issue for many indigenous peoples is their lack of formal and official title which proves their land ownership. This is a global phenomenon not limited to Africa, but the colonial legacy and its connection with present day legislation governing land rights has, until recently, not been examined in the context of indigenous peoples' rights. Under international law there is now a strong jurisprudence, notably emerging from the Inter-American Court of Human Rights, highlighting that possession should constitute title to land property.<sup>40</sup> This jurisprudence also puts forward the importance of recognizing indigenous peoples' own customary systems of tenure to recognize their rights to land. This issue has also been an important element

<sup>38</sup> See J Gilbert and V Couillard, 'International Law and Land Rights in Africa: The shift from States' Territorial Possessions to Indigenous Peoples' Ownership Rights' in R Home (ed), *Essays in African Land Law* (Pretoria University Press 2011) 47.

<sup>39</sup> See J Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2nd edn, Brill, 2016).

<sup>40</sup> *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-AmCtHR (ser C) No 79 (2001); *Moiwana Village v Suriname*, Inter-AmCtHR (ser C) No 124 (2005); *Yakye Axa Indigenous Community v Paraguay* Inter-AmCtHR (ser C) No 125 (2005); *Sawhoyamaza Indigenous Community v Paraguay* (2006); *Case of the Saramaka People v Suriname* (ser C) No 172 (2007); *Xákmok Kásek Indigenous Community v Paraguay* (ser C) No 214 (2010); *Kichwa People of Sarayaku v Ecuador* (ser C) No 245 (2012); *Case of the Kaliña and Lokono Peoples v Suriname* (2015).

of the jurisprudence of some of the common law jurisdictions from the period of the 1970s–1990s. Landmark rulings from Canada, Australia, and New Zealand were based on the central importance of recognizing that colonization, and the postcolonial legal systems, have not extinguished indigenous peoples' land rights.<sup>41</sup> These rights are based on their own customary laws which have 'survived' colonization and as such need to be recognized and protected by States.<sup>42</sup> The issue in many African States is not entirely different from this postcolonial concept of Aboriginal or Native Title. Indeed, many communities are facing the same issue of having to 'demonstrate' their right to land based on their actual possession, coupled with the claim that their land rights have survived colonization, and therefore should be recognized and enforced by postcolonial courts. In most African States this jurisprudence could have an important effect, as most States have indeed suffered from colonization and its attached doctrines of land dispossession and the imposition of formalistic legal systems that ignored indigenous peoples' ancestral possession. Besides early references to the notion of so-called 'Native Title' in Privy Council decisions,<sup>43</sup> until recently there was very little jurisprudence that had examined this postcolonial legacy of land rights. One of the first cases to examine this colonial legacy was in South Africa.

#### A. *The Survival of Customary Land Rights in South Africa*

Following the post-apartheid legacy on both land rights and non-discrimination, the courts in South Africa examined in detail the connection between land rights and indigenous peoples' rights in a case which reached both the Supreme Court and the Constitutional Court.<sup>44</sup> The case in question was by members of the Richtersveld community who brought a claim for the restoration of their ancestral land under the Restitution of Land Rights Act, a statutory mechanism giving effect to the government's constitutionally-mandated land reform and restitution programme. The Richtersveld community is a community of approximately 3,000 formerly nomadic and pastoralist people, who traditionally occupied land that was then annexed by Alexkor, a State-owned diamond mine. When the land was annexed, the company argued that the community lost their rights to the land. The government contended that indigenous customary laws on ownership ceased with the annexation of South Africa by the British in 1847, and that this loss of rights was not a

<sup>41</sup> See S Imai, BJ Richardson and K McNeil, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing 2009).

<sup>42</sup> For a detailed and critical analysis, see P McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (OUP 2011).

<sup>43</sup> See case of *Amodu Tijani v The Secretary of Southern Nigeria*, 2 AC 399 (1921); *In re Southern Rhodesia* [1919] AC 211, 223—Privy Council.

<sup>44</sup> See TM Chan, 'The Richtersveld Challenge: South Africa Finally Adopts Aboriginal Title' in Indigenous Peoples Rights in Southern Africa' in R Hitchcock and D Vinding (eds), *Indigenous Peoples' Rights in Southern Africa* (International Work Group for Indigenous Affairs 2004) 114–30.

dispossession as envisaged under the post-apartheid Restitution of Land Rights Act.

An important aspect of the case was the community's assertion that it used the land according to its 'indigenous customs' and that such customary law interests had not been extinguished by colonization and its apartheid legacy. The case went from the local Land Court to the Supreme Court, and then the Constitutional Court. An essential element was for the courts to define whether the customary land rights of the community could constitute land rights as protected under the Restitution of Land Rights Act. One of the arguments was that the community had a right to the land in question on the basis of their own indigenous customary land rights, rights that were discriminatorily ignored. At the lower levels, the claim was dismissed on the grounds that the claimants were dispossessed for the purpose of mining of diamonds and not because of racially discriminatory laws or practices. On appeal, the Supreme Court of Appeal recognized that the dispossession of the community was racially discriminatory 'because it was based upon the false, albeit unexpressed premise that, because of the Richtersveld community's race and lack of civilization, they had lost all rights in the land upon annexation'.<sup>45</sup> The Court highlighted that even though the undisturbed possession of the land by the indigenous community concerned was ignored on discriminatory grounds, indigenous laws regarding land rights had survived and extended to the current legal regime. The judges ruled that the Richtersveld community's customary right of ownership had survived the annexation by the British Crown as 'these rights constituted a "customary law interest" and consequently a "right in land"'.<sup>46</sup> As noted by the Court: '[A]n interest in land held under a system of indigenous law is thus expressly recognised as a "right in land", whether or not it was recognised by civil law as a legal right.'<sup>47</sup> The Court ultimately recognized the Richtersveld right to land based on their 'customary law interest under their indigenous customary law entitling them to exclusive occupation and use of the subject land and that its interest was akin to the right of ownership held under common law'.<sup>48</sup>

Both the company and the government challenged the ruling before the Constitutional Court, alleging that the Court of Appeal was wrong in holding that the community had a customary law interest in the subject land. A central aspect of their challenge was based on the colonial history of the land claim. Alexkor's representatives argued that after annexation in 1847 by the British the land had not been granted under any form of tenure, meaning that the British Crown became the only legal owner. Hence, from their perspective, the community had lost its rights to land in 1847 as a result of the annexation. Joining the Supreme Court of Appeal, the Constitutional

<sup>45</sup> *The Richtersveld Community and Others v Alexkor Ltd and the Government of South Africa*, Case No 488/2001, para 8 (24 March 2003).

<sup>46</sup> *ibid*, para 8.

<sup>47</sup> *ibid*, para 9.

<sup>48</sup> *ibid*, para 27.

Court rejected this argument, highlighting that colonial rules had not extinguished the customary land rights of the community. In highlighting the legal value of customary indigenous peoples' land rights, the Constitutional Court stated: 'indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law'.<sup>49</sup>

This ruling constitutes an important decision not only for the community concerned but also for many other indigenous communities who have also faced serious discrimination and non-recognition of their rights to land in South Africa. Due to the unique post-apartheid legal regime on which this decision was based, it is hard to foresee how such a decision might translate to other jurisdictions outside South Africa. Nonetheless, some aspects of this decision could be of some relevance to legal developments outside of South Africa, particularly its highlighting that colonization and its resulting postcolonial legacy has not extinguished indigenous peoples' land rights. This case also highlights the importance of the formal recognition of indigenous customary land laws. The cohabitation between customary laws and formal laws is extremely relevant for the whole continent, as most indigenous peoples still predominately refer to customary land tenure systems as their main legal norms when it comes to land rights.

#### *B. Land and Natural Resources in Botswana*

At nearly the same time another important legal battle on land rights was taking place across the border in Botswana. In the case concerning the CKGR, mentioned earlier, one of the central issues for the court was to determine whether the indigenous community had any right to the land and, if so, whether their forced removal was illegal. To address this issue the judges had to examine the issue of the survival of customary land laws and the nature and value of possession as constituting title. The High Court ruled in favour of the indigenous community, highlighting that their possession based on customary law 'survived' the creation of the game reserve both under colonial rules and in the post-independence period. The court highlighted that the forced removals of the community and the denial of their rights to occupy their ancestral territory were unlawful and unconstitutional. As noted by one of the judges, the establishment of the game reserve did not extinguish their customary land rights so the applicants 'were in possession of the land that they lawfully occupied'.<sup>50</sup> The court unanimously recognized the right of the applicants to live and reside in the reserve. In a similar approach to that adopted by the judges in South Africa, an important element of the ruling was the

<sup>49</sup> *Alexkor Limited and the Government of South Africa v The Richtersveld Community and Others*, Case CCT 19/03, at 51 (14 October 2003).

<sup>50</sup> Statement from Judge Phumpahi, *Central Kalahari Legal Case No MISCA 52/2002 in the Matter between Roy Sesana, First Applicant, Keiwa Setlhobogwa and 241 others, Second and Further Applicants, and the Attorney General* High Court of Botswana (2006).

recognition of the non-extinguishment of indigenous peoples' customary land rights under colonial rules and post-independent legislation.

However, there were some serious limitations within the ruling of the High Court in 2006. First, the court ruled that the stopping of services was lawful and the government was not required to restore basic and essential services in the reserve. This led to the impossible situation for the community of having their rights to live on their ancestral land recognized but not having the right to the water that could allow them to live on the land. During the forced relocation of the community outside the reserve, the authorities had destroyed several water tanks and sealed off some of the essential boreholes. This led to another court case which started in 2010. This time the focus was on the recognition of their right to access and use of water resources. In particular, the applicants sought permission to recommission, at their own expense, a borehole that had been closed by the government. The applicants lost their case at the first instance, the judge stating that 'The Basarwa have chosen to settle in areas far from those facilities. They have become victims of their own decision to settle an inconveniently long distance from the services and facilities provided by the government.' This was overturned on appeal when the community's fundamental right to access water was recognized. The court ruled that since the applicants were in 'lawful occupation' of their ancestral lands, they should have the right to drill their boreholes for domestic purposes. It has been a long legal battle for the San community residents of the game reserve to gain their right to live on their lands, taking four different cases of litigation.<sup>51</sup>

Some important lessons can be drawn from this process, and notably the importance of recognizing the fundamental connection between land and natural resources. Indeed, for many indigenous communities not only the San, land rights relate to the rights to use and access the natural resources found on their territories, including water rights and hunting and gathering rights. The second limitation of the case relates to the fact that the 'legal' victory concerns only a limited number of the original inhabitants of the reserve, as only the applicants listed had the right to go back, not the entire communities which were forcibly removed. Whilst the case has often been perceived to be a victory for the San of Botswana, the reality is different, as the case was filed in the name of 243 specific applicants. Hence the decision concerns only these applicants not the San communities as a whole. This restriction came to be realized by many of the residents of the reserve only very late in the day. This has served as a lesson across the border, as a case which was launched by several San communities in Namibia has been brought as a class action rather than as an individually based claim.

<sup>51</sup> More recently in 2014, five residents have lodged a new claim for the recognition of their right to hunt within the reserve, as without the possibility to hunt life in the reserve is impossible.

Overall, looking at litigation in both South Africa and Botswana, what emerges is the importance of a legal theory on 'indigenous customary title'. In both situations, the communities concerned won their cases based due to the recognition that colonial title to land ownership, and its ensuing postcolonial legacy, have not 'extinguished' indigenous peoples' land rights, and that their rights to land formed part of the contemporary legal framework governing land laws alongside other statutory and jurisprudential rights. Comparative legal analysis has played an important role in these decisions.

The courts have highlighted the importance of integrating indigenous peoples' customary land rights within the mixed and pluri-legal African systems. It is in this mix of common law, Roman-Dutch, civil statutory laws and customary law that a specific African approach to the meaning and content indigenous peoples' land rights appears. In terms of legal theories regarding indigenous peoples' land rights, it is important that the recognition of possession and customary law as a source of land rights does not come with the limitation of extinguishment which has been developed in common law countries such as Australia and Canada. Under the common law doctrine, Aboriginal or Native titles are subordinated to the 'illegitimate assumption of State power to extinguish such title'.<sup>52</sup> Instead, the courts in South Africa and Botswana adopted a less State-centric approach to indigenous peoples' land rights, emphasizing the power of customary laws.

Whilst, to some extent, this approach builds on the Aboriginal/Native title theories, it includes indigenous land laws on a much more equalitarian footing alongside other competing right. This approach is very specific to Africa, and arguably more compelling, as indigenous title seems to be less fragile and less totalizing as it is not submitted to a nearly impossible burden of proof that marks the common law theories on aboriginal title.<sup>53</sup> The emergence of an African indigenous title theory, or as captured by McHugh the '*creolisation*' of indigenous title theory, is based on a more atomized place for customary collective rights.<sup>54</sup> It is also developed in a way which better reflects human rights principles of equality and non-discrimination, which were clearly articulated by the petitioners and their legal teams as essential element of land rights.

### III. LITIGATING AGAINST CONSERVATION, DEVELOPMENT AND TOURISM

For many indigenous communities across the continent, wildlife conservation, economic development and tourism have often become synonymous with

<sup>52</sup> Final working paper prepared by the Special Rapporteur, Mrs E-I A Daes, 'Indigenous Peoples and Their Relationship to Land' UN Doc E/CN.4/Sub.2/2001/21 (2001) at 38.

<sup>53</sup> See P McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (OUP 2011).

<sup>54</sup> P McHugh, personal communication during the Half-Day Workshop on 'Adjudication and Indigenous Peoples' Queen Mary University (27 January 2016).



destitution and loss of lands.<sup>55</sup> In the name of development or conservation, indigenous peoples have often been pushed away from their traditional lands, losing access to their ancestral territories and the essential natural resources contained on these lands.<sup>56</sup> Several indigenous communities have suffered from 'aggressive conservationist initiatives' that have often resulted in their forced expulsion from natural reserves or other wildlife protection areas.<sup>57</sup> The other major negative factor affecting indigenous peoples relates to large-scale developmental projects on indigenous territories, including for examples dams, logging, mining and related infrastructures. These developments regularly lead to forced eviction, loss of lands and livelihoods, destitution and environmental degradation.

All these initiatives are usually undertaken in the name of development. When it comes to development and exploitation of natural resources, States often put forward the argument that they cannot stop these large-scale developments that will bring significant wealth to the whole country to protect just a few marginalized indigenous peoples.<sup>58</sup> Tourism is another 'plague' affecting indigenous peoples across the continent. The massive growth of the tourism industry over the last few decades has had a dramatic impact on indigenous peoples as their territories are often located on tourism hotspots. In this context, tourism often results in forced relocation, loss of livelihoods and the exploitation of indigenous peoples' own cultural assets without due recognition and benefits. Hence it is not surprising that most cases of litigation concern these three 'plagues': development, conservation and tourism. For example, in the previously discussed case from Botswana, one of the central arguments in defence of the forced removal of the community by the government was that such removal was done in the interest of conservation, tourism, and development.<sup>59</sup> Likewise, the South Africa case concerned mining interests and development. All these issues of development, conservation and tourism were also at the heart of the litigation between the Endorois community and the government of Kenya.

<sup>55</sup> See LA Young and K Sing'Oei, *Land, Livelihoods and Identities: Inter-Community Conflicts in East Africa* (MRG 2011).

<sup>56</sup> See Human Rights Committee: *Ivan Kitok v Sweden*, Comm No 197/1985, Report of the Human Rights Committee, GAOR, 43th Sess, Supp No 40 (A/43/40); *Lubicon Lake Band v Canada*, Comm No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40) at 1 (1990); *Hopu and Bessert v France*, Comm No 549/1993, UN Doc CPR/C/60/D/549/1993/Rev.1 (29 December 1997).

<sup>57</sup> See M Sapignoli and R Hitchcock, *People, Parks, and Power: The Ethics of Conservation-Related Resettlement* (forthcoming).

<sup>58</sup> See M Blaser, HA Feit and G McRae (eds), *In the Way of Development: Indigenous Peoples, Life Projects and Globalization* (Zed/IDRC 2004).

<sup>59</sup> Also worth noting that even though mining was not put forward as a ground for relocation, there is now a diamond mine in the southeast of the reserve, a planned copper-silver mine in the northwest, and several mining prospects pending elsewhere.

*A. The Right to Development and the Endorois in Kenya*

The Endorois are a predominantly pastoralist society living in Kenya's Rift Valley, and their practice of pastoralism has consisted of grazing their animals in the lowlands around Lake Bogoria. A Game Reserve has been established on their territory, and several game lodges, roads and a hotel have been built on their land. The government has also granted a concession for ruby mining on part of the territory. After years of frustrating negotiations and litigation at the national level, the Endorois community decided to take their case to the African Commission on Human and Peoples' Rights.<sup>60</sup> The Endorois alleged violations resulting from their forced displacement from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of their pastoralist way of life and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.

A central argument of the government was that tourism and the exploitation of natural resources (notably ruby mining) would bring significant resources to the region. The government highlighted the fact that the project for tourism around Lake Borogia was seen as a potentially positive development and all the revenues raised by the Game Reserves were reused to support development projects carried out by the County Council for the area. One of the arguments put forward by the government was that the establishment 'of a Game Reserve under the Wildlife laws of Kenya is with the objective of ensuring that wildlife is managed and conserved to yield to the nation in general and to individual areas in particular optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation'.<sup>61</sup> Overall, the government argued that other communities, and the country as a whole would benefit from the development. They also added that the community knew about the mining concession and would also benefit from its exploitation. The government concluded that 'the task of communities within a participatory democracy is to contribute to the well-being of society at large and not only to care selfishly for one's own community at the risk of others'.<sup>62</sup>

On their side, the Endorois argued that these developments were a violation of their right to development protected under Article 22 of the African Charter, which states: 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.' Based on this article, the Endorois argued that the decision of the government to proceed with these developments on their lands put them into a situation of disenfranchisement since it resulted in their losing access to a land essential for the maintenance

<sup>60</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm No 276/2003 (2010).

<sup>61</sup> *ibid*, para 178.

<sup>62</sup> *ibid*, para 270.

of their pastoralist way of life. The pastoralist community contended that the government had violated their right to development by its failure to adequately involve them in the development process taking place on their customary lands, as well as by its failure to ensure the continued improvement of the community's well-being. They highlighted that in forcing such developmental projects on their lands the government 'did not embrace a rights-based approach to economic growth, which insists on development in a manner consistent with, and instrumental to, the realization of human rights and the right to development through adequate and prior consultation'.<sup>63</sup> It is not so much the legitimacy of the decision of the government in turning the land into a tourism and wildlife reserve that the community was contesting but rather the way the decisions were made and, in particular, the lack of consideration given to their culture and survival. They emphasized that the Game Reserve and their pastoralist way of life should not be considered mutually exclusive. Linking self-determination and development, they stressed that they had 'suffered a loss of well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them'.<sup>64</sup> The community highlighted that 'self-determination also include the ability to dispose of natural resources as a community wishes, thereby requiring a measure of control over the land'.<sup>65</sup>

In terms of legal jurisprudence, the position of the two parties on the meaning of the right to development made it a very compelling case since there has been very little litigation on the right to development. Under international human rights law there have been debates on the theoretical implications of the right to development but very few instances of legal adjudication.<sup>66</sup> In general, the right to development has not been seen as a justiciable right. Regarding the scope of the right to development, the African Commission highlighted that 'the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end'.<sup>67</sup> Adopting a pragmatic focus, the Commission concentrated on two principal issues: (1) the extent to which the community had (or had not) been consulted prior to the establishment of the wildlife reserve on their territories and (2) whether such development provided benefits to the community concerned. The Commission found that the lack of 'meaningful participation' by the Endorois, who 'were informed of the impending project [on their land] as a *fait accompli*', was a violation of the right to development. The Commission

<sup>63</sup> *ibid*, para 135.

<sup>64</sup> *ibid*, para 129.

<sup>65</sup> *ibid*, para 129.

<sup>66</sup> For a review and references, see M Salomon and A Sengupta, 'The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples' (Minority Rights Group International 2003); D Aguirre, *The Human Right to Development in a Globalized World* (Routledge 2008); K De Feyter, *World Development Law* (Intersentia 2001); M Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press 2007).

<sup>67</sup> Endorois Case (n 55) para 277.

found that the government had violated the right of the indigenous community to their culture, land, and development. It rejected the argument put forward by the government that the community's rights should be 'sacrificed' in the name of development, tourism and conservation. Instead, the Commission underscored that a fair balance should be struck, ensuring that the community would also benefit and participate in these developments. From a global legal perspective, this aspect of the case is extremely appealing since there are few cases that have specifically focused on the right to development in the context of large-scale developmental projects taking place on indigenous peoples' territories. This legal reasoning could have some important echoes across the continent, as most governments usually justify the forced displacement of marginalized indigenous communities on the basis that it is necessary to allow development, conservation and tourism.

### *B. Tourism, Corporations and the Maasai in Tanzania*

Three indigenous Maasai communities in northern Tanzania find themselves in the middle of a complex legal battle to reclaim their rights over their ancestral lands and resources following the acquisition of their lands by private corporations.<sup>68</sup> In 2010, the Maasai villagers concerned had filed a petition with the local High Court in Arusha after they were forced from their land and blocked from vital water sources to make way for a luxury safari camp near the world-famous Serengeti National Park. The safari camp is run by a subsidiary Tanzania entity of a US-based Safari Company, Thomson-Wineland Adventures Inc., also known as Thomson Safaris. In 2006, Thomson's affiliate, Tanzania Conservation Ltd. (TCL), acquired 12,617 acres of land known as 'Sukenya Farm', which had traditionally been used by the Maasai communities. Their legal claim is based on a complex and historical battle over the land which started in 1984 when the government-owned Tanzania Breweries Limited (TBL) acquired 10,000 acres at Sukenya Farm, without any consultations with, consent from or compensation to the local communities. The aim of the brewery company was to cultivate barley and wheat, but ultimately it only used a very small parcel of the land (700 acres), while the remaining part of the land was used by the Maasai communities for grazing and watering their livestock. In 2006, the land was then sold to the Tanzania subsidiary of Thomson Safari without any form of consultation, or involvement of the indigenous pastoralists communities.

The indigenous communities challenged the legality of the acquisition of their lands in a petition to the High Court. Their claim was based on the fact

<sup>68</sup> *Mondorosi, Sukenya and Soitsambu Village Councils v Tanzania Breweries Limited, Tanzania Conservation Ltd*, Ngorongoro District Council, Commissioner for Lands and Attorney-General (Tanzania), see <<http://minorityrights.org/law-and-legal-cases/mondorosi-sukenya-and-soitsambu-village-councils-v-tanzania-breweries-limited-tanzania-conservation-ltd-ngorongoro-district-council-commissioner-for-lands-and-attorney-general-tanzania/>>.

that the acquisition had not followed required conditions concerning consultation and compensation. In their complaint to the court the villagers also highlighted that their continuous peaceful occupation of the land since its wrongful acquisition in 1984 meant that they were the rightful owners of the land under the theory of acquired rights. They asked the court to recognize the illegality of the acquisition of the land by the US based Safari Company. In their application the villagers requested that the court revoke the company's land title, prevent them from converting the land's designated use from pastoralism to tourism, and award damages for the injuries they suffered due to their exclusion from the land. However, in 2015, the High Court ruled against the villagers, except for a minor point concerning an illegal transfer of part of the land, but no damages were awarded to the communities.<sup>69</sup> Whilst this undoubtedly represents an important setback for the applicants, there are some important legal aspects of their legal battle that need to be highlighted.

An important aspect of the case relates to the allegation being against the act of a corporation based in the US. Legally, the communities could not take direct action against the US-based corporation in a local court as it had been operating through a subsidiary based in Tanzania. With the assistance of Earth Rights International, an international NGO based in the US, the three Maasai communities turned to a US federal court to support their ongoing legal battle over the land they had lost to Thomson Safaris.<sup>70</sup> The federal court action was filed under the Foreign Legal Assistance (FLA) Statute (28 U.S.C. section 1782), a law that allows people to obtain documents and information from individuals or companies in the US to support foreign legal proceedings. The aim of the legal action in the US was to show that Thomson Safari knew that the land confiscation was illegal and were aware of the extremely negative consequences that such illegal acquisition would have for the communities. The documents and information that were made available through this legal proceeding in the US were vital to support the claim of the communities in Tanzania. It was also an innovative and novel way—not much used in the US—of bringing the litigation 'home'. Whilst the situation in this case might sound very specific, it reflects the situation faced by many indigenous communities across the globe. In many situations private corporations acquire indigenous territories under similar processes using nationally or locally registered subcontractors or use subsidiaries to conduct their operations on indigenous territories. From this perspective, the complexity of the legal action that the Maasai villagers had to go through is a good indicator of the complexity of the legal strategies that many indigenous communities have

<sup>69</sup> See 'MRG Deeply Disappointed by Arusha Court Land Rights Judgment against Loliondo Maasai' at <<http://minorityrights.org/2015/10/28/mrg-deeply-disappointed-by-arusha-court-land-rights-judgment-against-loliondo-maasai/>>.  
<sup>70</sup> See <<http://www.earthrights.org/media/maasai-villagers-turn-us-courts-information-abusive-evictions-us-safari-company>>.

to face when multinational corporate interests are invading their territories. It also shows how international support from international actors can be crucial when engaging in such transnational litigation.

#### IV. LACK OF IMPLEMENTATION, STRATEGIC LITIGATION AND LEGAL EMPOWERMENT

For many marginalized indigenous communities taking legal action is a daunting process. It is complex, technical, lengthy and costly. Moreover, there is no guarantee of winning a case, and even in cases which are won the prospects of implementation are often tenuous. Nonetheless, as this article has shown, many very marginalized indigenous communities are engaging with litigation. This last section examines some of the hurdles faced by indigenous peoples in engaging with litigation in order allow a reflection on the reasons that are pushing indigenous peoples to do so. The aim is to examine to what extent litigation is part of a strategy for social change (referred to as strategic litigation) and to what extent it facilitates legal empowerment of marginalized indigenous communities. To undertake such an analysis, three important phases of the litigation process will be considered, namely: (1) the pre-trial development of a legal strategy and the process of evidence gathering by the communities and their legal support team; (2) the trial phase itself, which is often a lengthy and costly process; (3) and the post-ruling phase, since even a victory in court does not signal the end of the legal battle for implementation.

##### *A. Pre-Trial Strategy: Community and Evidence Gatherings in Uganda*

The decision to take legal action by the Batwa represents a compelling example of community mobilization and the development of a legal strategy before going to litigation. The Batwa do not live as one united community but live in scattered small communities, squatting either at the borders of the lands they have been evicted from or in the vicinity of villages or towns that are near the parks. In 2000, several community leaders, with the support and involvement of outsiders and NGOs, decided to establish the United Organisation for Batwa Development in Uganda (UOBDU) as an umbrella organization to support the Batwa unite and engage in informed advocacy for their rights. The UOBDU quickly became a place for communities to voice their concerns and share similar stories of discrimination. It became the main avenue for them to express their concerns to the government, notably through numerous exchanges and discussions with local councils, various government departments as well as the Parliament of Uganda.<sup>71</sup> Under the umbrella of the

<sup>71</sup> See eg 'The Batwa Declaration to the Government of the Republic of Uganda on Securing their Land Rights' at Kisoro 2009, available at <<https://uobdu.files.wordpress.com/2011/05/declaration-signed.pdf>>.

organization the Batwa also started to address international and regional human rights mechanisms, which led to the issuance of clear guidance on how Uganda should address the human rights situation of the Batwa.<sup>72</sup> However, over the years of negotiations and push by international and regional human rights institutions, the hope of achieving remedies outside the courts faded as no concrete measures were put in place by the national authorities. Worse, the overall situation of the Batwa continued towards further impoverishment and discrimination. As a result of the lack of proper engagement from the local and national authorities, the Batwa, via their traditional leaders and through discussions with most members of the communities, decided to take the government to court.

Initially, most of the Batwa would have preferred the option of dialogue and negotiations. The predominant view from most members of the community was in favour of not 'attacking' the government in court, as the authorities were still seen as important and respectful allies whose support was necessary to them. However, after a few years of frustration and the lack of any proper engagement by the authorities a debate started within the community about the next steps to follow. Under the umbrella of UOBDU, the Batwa had put in place a very efficient forum for discussion in which representatives of many communities gathered together to discuss the process ahead.<sup>73</sup> Over the years, this forum has proven to be a very powerful agent for the Batwa not only to express their view, but also to get a sense of empowerment by sharing their common experiences. Through this forum the Batwa started to use a common language to express their grievances. Hence when the issue of taking legal action eventually arose, the Batwa had already been developing a common platform to engage with the issues to be put forward. This forum was used to express grievances and translate these into a legal language. The representatives of the communities would report back to their communities and then report back to the forum about the decisions from the other members. As such, the decision to take legal action was taken collectively though a long process of dialogue.

Once the decision to take legal action was put forward, the forum was then used as a platform to build the legal argumentation. An important aspect was to gather evidence to bring to court. Generally, bringing evidence on land and resources ownership is a serious challenge for indigenous communities. As they usually do not have official administrative proof of ownership they have to rely on oral testimony and community members' evidence of usage and possession of the land. Increasingly, communities are using mapping technologies, such as GPS and GIS, to support their claims. The Batwa faced

<sup>72</sup> See D Jackson, 'Implementation of International Commitments on Traditional Forest-Related Knowledge: Indigenous Peoples' Experiences in Central Africa (Forest Peoples Programme 2004).

<sup>73</sup> For references, see the Constitution of the organization available at <<https://uobdu.files.wordpress.com/2011/05/uobdu-constitution-dec-09.pdf>>.

all these difficulties, which were made more difficult due to the fact that their removal had taken place over a prolonged period from the 1920s until the 1990s. This meant that many members of the community had never 'legally' lived on their ancestral territories. Hence the decision was made to record evidence from the eldest of the community who had lived on the lands concerned and who had faced the eviction. In 2011 the Batwa created three-dimensional models of both Bwindi and Mgahinga national parks which depicted their spiritual and cultural attachments to the forest and specific sites within the forest. At the time of writing, the case has yet to be heard and ruled upon by the Constitutional Court. However, many of the issues faced before launching the case highlight some important elements regarding the process of legal empowerment which flows from a community deciding to use litigation and the process of evidence gathering.

### *B. Strategy to Support Litigation in Botswana*

The previously mentioned case from the High Court of Botswana is the longest and most expensive case in the country's legal history. The first court case ran from 2004 to 2006, but the legal proceedings started in 2002, and two other cases followed in 2011 and 2015. The long and arduous legal proceedings meant that many of the applicants, at least 10 per cent of the original applicants, passed away before the case even began in 2006.<sup>74</sup> In addition, litigation is also a costly process, especially since these cases are usually extremely lengthy and technical. Indigenous communities are usually marginalized and do not have the necessary monetary means to support such long processes of litigation. From this perspective, all the cases mentioned so far have received support from legal firms and civil society organizations. In the case of the San in Botswana, Saugestad has analysed how the support from external actors was essential in supporting the indigenous communities both in terms of legal analysis, via the involvement of international lawyers, funding, via the support from international NGOs, and also advocacy via the use of international media and lobbying groups.<sup>75</sup> As she noted: 'there is no way a group of poor illiterate San could have raised the case on their own (...)'. Originally the applicants and their legal team had envisaged that the court case would take about one year, instead of the nearly 11 years it actually took. This meant that the financial resources initially made available were not sufficient to sustain the case. After the first phase of the case, the claimants decided that it would be a good idea to hire more lawyers. To that

<sup>74</sup> M Sapignoli and R Hitchcock, 'A Chronology of the Central Kalahari Game Reserve: Update III, 2002–2012' (2013) 45 *Botswana Notes and Records* 52.

<sup>75</sup> S Saugestad, 'Impact of International Mechanisms on Indigenous Rights in Botswana' (2011) 15(1) *IJHR* 37.



end, a fundraising tour of the US was sponsored by the Indigenous Land Rights Fund and the Kalahari Peoples Fund was initiated.<sup>76</sup>

The situation of the San in the CKGR in Botswana has received significant coverage and involvement from INGOs, including some of the most well-established international organizations working in support of indigenous peoples. The International Work Group for Indigenous Affairs (IWGIA) has funded First People of the Kalahari (FPK) which was instrumental in supporting the capacity-building of the community for the purposes of the legal case.<sup>77</sup> Cultural Survival, one of the largest NGOs supporting indigenous rights globally, has been extremely proactive in producing numerous articles, reports and press releases on the central Kalahari. Survival International has been especially active producing 'Urgent Action Bulletins' on the central Kalahari situation, and by providing some funding and support for the applicant's legal team. As highlighted by Sapignoli, an important element in the San receiving such strong support from Western NGOs was because they became a 'receptacle of Western imaginaries of anti-modernity and otherness, as peoples' and 'a focal point of conflict over different understandings of human worth, dignity, and equality'.<sup>78</sup> This involvement from international NGOs led the government to claim that the case was led by foreigners.

International and regional human rights organizations also played a significant role in the background of the case, particularly by putting pressure on the authorities regarding the situation in the CKGR.<sup>79</sup> For example, in 2005 in the midst of the legal case two members of the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights visited Botswana.<sup>80</sup> The African Commission on Human and Peoples' Rights has also expressed concerns to the government about the treatment of the people of the Central Kalahari.<sup>81</sup> The (former) UN Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples has also played a proactive role in reporting on the situation and visiting the country.<sup>82</sup>

<sup>76</sup> The lack of funding means that now the organization First People of the Kalahari which was set up to support the court action has run out of money and closed down.

<sup>77</sup> See R Hitchcock and M Enghoff, *Capacity Building of First People of the Kalahari: An Evaluation* (International Work Group for Indigenous Affairs 2004).

<sup>78</sup> M Sapignoli, 'Dispossession in the Age of Humanity: Human Rights, Citizenship, and Indigeneity in the Central Kalahari' (2015) 25(3) *Anthropological Forum* 285.

<sup>79</sup> See M Sapignoli, *Local Power through Globalized Indigenous Identities: The San, the State, and the International Community* (unpublished PhD thesis, Essex University 2012).

<sup>80</sup> See Working Group on Indigenous Populations/Communities in Africa, Mission to the Republic of Botswana, 15–23 June 2005. Available at <<http://www.achpr.org/states/botswana/missions/indigenous-2005/>>.

<sup>81</sup> See African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Botswana, Forty-Seventh Ordinary Session, 12–26 May 2010. Available at <[http://www.achpr.org/files/sessions/47th/concobs/1st-1966-2007/achpr47\\_conc\\_staterep1\\_botswana\\_2010\\_eng.pdf](http://www.achpr.org/files/sessions/47th/concobs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf)>.

<sup>82</sup> Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, The Situation of Indigenous Peoples in Botswana, UN Doc A/HRC/15/37/Add.2 (June 2010).

The involvement of international actors was not always a positive force as it created some dissension amongst the various local and national organizations previously involved. For example, some of the local NGOs pulled out of the negotiations because they felt that the approaches being employed by Survival International were too aggressive and counterproductive.<sup>83</sup> As analysed in great detail by Saugestad, the involvement of so many international actors, and the polarization that it created between the different local actors, 'has paradoxically endangered the possibility of generating a stronger locally-based movement advocating for San rights'.<sup>84</sup> International involvement was also an essential ingredient in the establishment of the legal team. The legal team was composed of lawyers from South Africa, who were joined by a British lawyer when Survival International became involved in the case. The role of the lawyers raises several issues, not only in this case but also more generally when it comes to litigation on indigenous rights. The legal procedures being usually extremely complex and jargonized, lawyers representing the indigenous communities tend to become the leaders of the legal strategy rather than the community itself. In the case of Botswana, Saugestad noted that 'once the case proper started, the formalities of the legal process took control, the lawyers took centre stage, and the applicants became spectators'.<sup>85</sup>

This case shows how essential it was for the applicants to get international support, but it also highlight the potential pitfalls of this involvement. The international involvement played a positive role in supporting the legal argumentation and the advocacy around the case. It was also an essential element in the case management and in ensuring the financial sustainability of the court action. However, it has also created serious tensions within the national and local setting, creating dissension between the national human rights actors and the communities. Ironically, it contributed to the disempowerment of the individuals most concerned, who became secondary actors in their own court case as the centre stage was taken over by international actors, including INGOs and lawyers. In this context, it is essential to ensure that a cohesive strategy between all partners in the court case is defined and respected to ensure the direct participation and consultation at all levels of the communities concerned. This is certainly an important lesson which should be learnt from in other cases of litigation with a heavy involvement of external actors.

<sup>83</sup> See J Solway, 'Human Rights and NGO "Wrongs": Conflict Diamonds, Culture Wars, and the "Bushman Question"' (2009) 79(3) *Africa* 329; S Saugestad, 'Impact of International Mechanisms on Indigenous Rights in Botswana' (2011) 15(1) *IJHR* 37.

<sup>85</sup> *ibid* 44.

<sup>84</sup> Saugestad (n 83) 56.

*C. Strategy to Support Implementation of the Endorois Decision*

Winning a case is undoubtedly an extremely positive outcome, but it is not the end of the road as very often the process of implementation is in itself an arduous process for communities engaging with litigation. As noted earlier, in 2010, after years of litigation, the Endorois of Kenya won an important legal battle when the African Commission established that the government should return their ancestral lands, ensure unrestricted access to Lake Bogoria, pay adequate compensation for all losses suffered, pay royalties regarding existing economic activities, and engage in dialogue with the complainants regarding future development on their territory.<sup>86</sup> More than six years later, at the time of writing, the decision still remains to be implemented by the Kenyan government. Unfortunately, this is not an isolated story, as across the globe many indigenous communities who have won cases are still awaiting implementation.<sup>87</sup>

From this perspective, an interesting development is taking place in Kenya, where the community has been leading a process to support the implementation of the decision. The community established the Endorois Welfare Council as a platform to enhance their capacity to support the litigation. The council now plays an important role in seeking to focus the effort and support the community to effectively negotiate with the government regarding the implementation of the decision. Working alongside other national and international organizations, Minority Rights Group (MRG) has been extremely proactive in holding strategic meetings, organizing workshops with leaders of the Endorois community on different options of land restitution and compensation, conducting surveys on immaterial losses, analysing data on material losses, building the capacity of the Endorois Welfare Council to seek implementation, organizing paralegal training, supporting community outreach and seeking the active involvement of African Union and United Nations bodies, including the ACHPR holding one of only two hearings on implementation and issuing its first ever resolution on non-implementation.<sup>88</sup> As a result of such proactive civil society action, in 2014 the government established a 'Task Force' to address the ACHPR's decision.<sup>89</sup> Whilst this task force has some serious limitations, notably the fact it is mainly composed of government officials, and that its mandate is to 'study the

<sup>86</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 9).

<sup>87</sup> For illustrations, see S Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change' (2015) Special Edition *Revue Québécoise de Droit International* 199. See also J Gilbert, *Strategic Litigation Impacts on Indigenous Peoples' Land Rights* (Open Society, Justice Initiative 2017).

<sup>88</sup> See R Marlin, "'The Endorois Decision' – Four years on, the Endorois Still Await Action by the Government of Kenya" (Minority Rights Group 2014).<sup>89</sup> On the task force: <<https://www.escr-net.org/news/2014/first-meeting-kenyan-task-force-implementation-endorois-decision>>.

Decision', it nonetheless represents an important platform which has emerged following the persistent push from civil society to support the implementation of the legal decision. Moreover, due to civil society pressure there has been some movement on the part of the government, which was at first quite lethargic regarding the implementation of the decision. This experience of implementation could be shared across the continent as non-implementation is not unique, nor is it limited to decisions adopted by regional institutions rather than national courts. For example, the government of Botswana has failed to implement the ruling issued by the High Court in 2006. In many ways, the lack of implementation raises the question of the viability and usefulness of litigation. Litigation takes up a lot of resources, time and energy from the communities, hence the prospect of non-implementation calls into serious question the viability of using courts as an agent of change.

Nonetheless, what the litigation process in Kenya, as well as the other cases that have been examined in this article, show is the important role that litigation plays as a tool to support the legal empowerment of the communities concerned. In all the situations examined the communities are extremely marginalized, and are usually facing some serious forms of discrimination from the rest of society. Taking legal action is often an important catalyst to support their affirmation as equal citizens of the State entitled to a voice. As powerfully captured by Sapignoli in the context of Botswana, litigation can have important effects as not only does it put into the open the illegality of the government's action against its own citizens, but it also 'reinstated the applicants' "right to have rights", as those who, as citizens, can bring their own government to court and refer to state laws to have their rights recognized'.<sup>90</sup> This analysis is equally applicable to Kenya, and also more generally for all indigenous communities who have engaged in litigation. It seems that, in addition to its direct outcomes through the court decision, litigation supports community building through the process of developing legal strategies to gain recognition of their rights. The process itself contributes to the empowerment of the communities and thus the reclamation of their rights whilst enhancing their visibility and entitlement as citizens. From this perspective, engaging in litigation can be seen as an important element within a more general strategy aimed at visibility and political empowerment even if the decisions themselves may lack implementation.

#### V. CONCLUSION

As indicated in the introduction, this article has two main objectives: first, to examine to what extent a jurisprudence on indigenous peoples' rights is emerging across the continent, and, secondly, to explore the challenges and

<sup>90</sup> M Sapignoli, 'Dispossession in the Age of Humanity: Human Rights, Citizenship, and Indigeneity in the Central Kalahari' (2015) 25(3) *Anthropological Forum* 18 (references omitted).

limitation of using litigation as a tool for social change. In terms of the development of an African jurisprudence on indigenous peoples' rights, the current wave of litigation on indigenous peoples' rights supports the emergence of a systematic set of principles. This includes the increased reference to the legal term 'indigenous peoples' as developed under international law as a way of recognizing the historical marginalization and discrimination faced by indigenous communities. Courts have started to refer to the rights of indigenous peoples as a way of condemning governments for not taking proactive and systematic legal measures to recognize indigenous peoples' rights. It can therefore be argued that the legal category of 'indigenous peoples' has allowed communities (sometimes divided by colonization) to reassert their rights, using the concept of 'indigeneity' as a means of defining themselves as peoples entitled to specific rights. The references to indigenous peoples' rights as defined under international and regional law has allowed communities to highlight that: (1) they are different from the majority population; (2) that they have historically been mistreated and discriminated against; and (3) that this treatment occurred in part because of their lifestyles and distinct cultural attributes. It has also been seen that an African approach to land rights is emerging which tackles the inherent colonial land legacy on the basis that indigenous peoples' customary land rights have survived colonization and independence, and form part of contemporary land rights. In a general context in which most of Africa is witnessing an intense 'land grab', the recognition of a specific right for indigenous peoples to land is certainly an important breakthrough.

Another important element of the emerging jurisprudence on indigenous peoples' rights relates to the narrative of development. Across the continent indigenous peoples are often the victims of imposed forms of development resulting in displacement, forced relocation and destitution. Courts are starting to engage with the issue through their examination of the acquisition of indigenous territories and how development has been used as a justification for the removal of indigenous peoples. Courts can provide possible means of challenging the top-down narrative of development imposed by States through their acceptance of the need to recognize the rights of indigenous peoples. There are glimpses of the potential role that courts could play to provide a more participatory and beneficial approach to development. However, apart from the decision from the African Commission, there is not yet a very convincing engagement with the issue of development. It is not yet entirely clear to what extent courts could become a place to challenge the dominant narrative on development which usually results in the forced displacement of indigenous peoples on grounds of development or conservation. This is most probably the next important step in the expansion of a specifically African jurisprudence on indigenous peoples' rights given the way in which development, conservation and tourism are affecting communities across the continent.

A second set of remarks relates to the more practical aspects of engaging with litigation. As noted earlier, litigation is a lengthy, technical, and costly process usually requiring the involvement of external actors. This includes local/national/international NGOs with external funding. Based on the experiences of the communities who have engaged in this process, two important points seem to emerge. First, relying on this source of external support is unpredictable. NGOs are very often limited to short-term funding and objectives, whereas litigation is long term and unpredictable. This means that indigenous peoples have to rely on a multitude of changing actors to support their case. As in the case of Botswana, it may prove hard to develop a long-term litigation strategy when this depends on several different sources of funding and support. Secondly, such involvement from external actors has implications regarding the way a legal strategy is developed. External actors will engage on the basis of their own visions and interests. This might not always match and relate to the interests and vision of the community concerned. As noted earlier, this can lead to some serious tensions between the different civil society supporters and also within the communities themselves. Importantly, it also means that the communities can easily lose control of the content of the arguments put forward to the courts. The technicality of the legal language used by the lawyers, the judges and the NGOs can alienate indigenous peoples who find themselves becoming secondary actors in their own court case. From this perspective, the approach developed by the supporting organizations is an essential element of the court case, and needs to be based on a very inclusive, open, and clear participatory model. This takes time and energy, but if done well it can result in the litigation becoming an important empowering platform for the communities.

Finally, and as a final remark to broaden the debate, it is worth noting the irony that courts, which are a part of the legal and political systems that have discriminated against indigenous peoples, are being approached for remedies. Historically, law and legal institutions have played a significant role in the alienation and marginalization of indigenous peoples. Indigenous peoples are asking the very system that has contributed to that prejudice to determine whether or not the prejudice is justified. Whilst arguably courts have dramatically changed since the colonial era and have adopted a much forward-looking approach, the legacy of the legal institutions in supporting land alienation is not something that can be ignored. As noted in all the cases examined, indigenous peoples have usually preferred to engage in negotiations rather than litigation. Litigation came as a last resort and after years of frustration. Litigation comes as the last possible remedy when dialogue has failed, offering an important last step in a strategy to achieve recognition of their rights. These cases provide a good illustration of how litigation can be used as a means of achieving political recognition (irrespective of the results or implementation of the cases), and how litigation can support the legal empowerment of extremely marginalized indigenous communities. The court

process itself is, however, only one part of the story: engaging with courts demands a huge effort in terms of political and structural organization from the communities, and this is an effort which in itself contributes to their empowerment.